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Beware the doctrine of election!

The operation of the doctrine of election, as it applies in a conveyancing context, was recently considered by the Queensland Court of Appeal (McMurdo P and White and Fryberg JJ) in *Barooga Projects (Investments) Pty Ltd v Duncan* [2004] QCA 149.

Facts

The parties entered into a contract for the sale of land on 10 February 2003. The contract was subject to the local authority issuing development conditions that were satisfactory to the buyer ('the condition'). The buyer was obliged to notify the seller within thirty (30) days of receipt of the development conditions whether they were satisfactory. Settlement was due to occur 180 days from the date of the contract or within 30 days of the buyer's notification of satisfaction of the condition, whichever was later. Time was of the essence of the contract.

The contract did not specify a date for the satisfaction of the condition. More than 180 days having elapsed, and no notification having been received regarding the satisfaction (or otherwise) of the condition, the seller's solicitor wrote (on 26 September 2003) to the buyer's solicitor a letter which provided in part:

"In the absence of a specified date, the law implies a reasonable time in which the buyer is to obtain acceptable conditions of approval.

Our client considers that a reasonable time has now elapsed.

We now give you formal notice on behalf of the seller that he requires the buyer to settle this contract within twenty one (21) days of the date hereof... *failing which he specifically reserves his rights as a consequence of the buyer's failure to settle.*" (emphasis added)

The buyer did not settle within the 21 day period (which expired on 17 October 2003). On 5 November 2003 the buyer's solicitors wrote to the seller's solicitors stating that the condition had been satisfied and nominating a date for settlement. On 10 November 2003 the seller's solicitors wrote a letter in which they noted that the buyer had failed to settle by 17 October 2003 and on this basis they advised that the contract was terminated.

At first instance, it was noted it was not in dispute that, since no time limit was fixed for satisfaction of the condition, satisfaction within a reasonable time was to be implied and that a reasonable time had expired when the first letter was written on 26 September 2003. On this basis, the learned trial judge reached the following conclusions. As at 26 September 2003 as a reasonable time had

expired without the condition being satisfied the contract was then voidable at the instance of either party. The letter of 26 September 2003 called for completion of the contract without explicitly reserving the right to terminate on the grounds that the reasonable period for satisfaction of the condition had expired and, as such, constituted an irrevocable election to affirm the contract. As the buyer had subsequently waived the benefit of the condition, the contract was still on foot and the buyer was entitled to call for settlement.

Decision of the Court of Appeal

The fundamental question for the Court of Appeal was whether the letter of 26 September 2003 constituted an election, by the seller, to affirm the contract, which election could not be retracted. Although separate judgments were delivered, the members of the Court of Appeal were unanimous in their view that the conclusions of the learned primary judge were correct.

McMurdo P noted that the heart of the doctrine of election is that a party electing is confronted with two mutually exclusive courses of action between which that party must make a choice. The letter of 26 September 2003 affirmed the seller's commitment to the contract by calling on the buyer to complete. As such, the letter was consistent only with the continued existence of the contract. Similarly, White J agreed that the letter of 26 September 2003 was, objectively, only consistent with an election to continue the contract and, as an election against termination had been made, could not be retracted. In reaching the same conclusion, Fryberg J considered it to be significant that the letter demanded settlement unconditionally without any suggestion that the seller was contemplating an alternative course of action.

All three judges noted that the result may have been different if the letter explicitly reserved (until 17 October 2003) the seller's right to terminate the contract on the ground that a reasonable period for satisfaction of the condition had expired. Unfortunately for the seller no reservation of this type was present. It did not help that the seller reserved his rights as a consequence of the buyer's failure to settle. The seller's right to terminate did not arise as a consequence of the buyer's failure to settle but as a result of the non-fulfilment of the condition within a reasonable time.

Practice Pointers

Election requires that a choice be made between inconsistent remedies, affirmation and termination. An election to affirm a contract does not depend upon actual intention; it will be inferred from any conduct that is only consistent with the continued existence of the contract (*Tropical Traders Ltd v Goonan* (1964) 111 CLR 41, 55). Once made, an election is not capable of retraction.

It is possible to reasonably delay the election to affirm or terminate a contract (*Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust* (NSW) (1993) 182 CLR 26). However, to avoid any inference being drawn that a right to terminate the contract has been abandoned, by operation of the doctrine of election, the right to terminate should be expressly reserved. If the right to terminate (in this instance for non satisfaction of the condition) is not clearly reserved the right may be lost.

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